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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 160 (MKV)

5 SETH FISHMAN and
6 LISA GIANNELLI,

7 Defendants.

Conference

8 New York, N.Y.
9 January 18, 2022
2:15 p.m.

10 Before:

11 HON. MARY KAY VYSKOCIL,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

15 BY: ANDREW C. ADAMS

16 SARAH MORTAZAVI

ANDEN F. CHOW

17 Assistant United States Attorneys

18 SERCARZ & RIOPELLE, LLP

Attorneys for Defendant Fishman

19 BY: MAURICE H. SERCARZ

-and-

20 MARC A. FERNICH

21 FASULO, BRAVERMAN & DiMAGGIO, LLP

Attorneys for Defendant Giannelli

22 BY: LOUIS V. FASULO

-and-

23 BOBBI C. STERNHEIM

24 BY: ALEX S. HUOT (appearing remotely)

25 Also Present: Karline Jung, Paralegal Specialist

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1 (Case called; appearances noted)

2 THE COURT: Good afternoon to all of you. We're here
3 for the final pretrial conference in this matter.

4 There are a number of things I thought we should talk
5 about today, the first of which is voir dire, which will begin
6 tomorrow, first thing in the morning.

7 Before we do that, let's just talk about and make sure
8 everyone is comfortable with and doesn't have issues with the
9 setup in the courtroom.

10 MR. FASULO: Judge, just one issue from me -- two
11 issues from me, actually.

12 THE COURT: Yes. I'm sorry, Mr. Fasulo.

13 MR. FASULO: Two issues from me, your Honor.

14 THE COURT: It might be better if to stand just so I
15 can see you.

16 MR. FASULO: Yes, that's one of the issues that I
17 have.

18 THE COURT: I know. I know.

19 MR. FASULO: One of the issues I have from where I am
20 right now is, and I'm OK to kind of move my head a lot, but I
21 can't see the Court often, so that could present a problem if
22 there's an objection or something, so I will try to move back
23 and forth.

24 THE COURT: Yes, and speak loudly into the
25 microphone --

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1 MR. FASULO: Sure.

2 THE COURT: -- if you have an objection.

3 MR. FASULO: That's one issue --

4 THE COURT: Yes.

5 MR. FASULO: -- we can address with the Court.

6 The witness, however, though, if I have somebody stand
7 here and if somebody is in the booth, it really does block,
8 because of where this table is situated, it blocks my complete
9 vision of the witness.

10 THE COURT: What if you sit in the other seat?

11 MR. FASULO: Let me see. Maybe that will be --

12 THE COURT: Sometimes the simplest practical thing --

13 MR. FASULO: Actually, if I do sit here --

14 THE COURT: Yes.

15 MR. FASULO: -- it will be much better.

16 THE COURT: OK.

17 MR. FASULO: So I think that will alleviate that issue
18 for me.

19 THE COURT: OK. That's an easy solution.

20 MR. FASULO: Thank you, Judge. Logistically
21 (inaudible).

22 And then the last thing is, as you know, Mr. Huot is
23 still working on the case, but he's not going to be at trial in
24 the courtroom, and I hope that's OK with the Court.

25 THE COURT: Sure.

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1 MR. FASULO: So we're ready. It's not an issue for us
2 in that regard.

3 However, Mr. McCabe, who comes from my office, he is
4 going to be in court, and I need him, obviously, because there
5 is a lot of last-minute juggling here.

6 THE COURT: OK.

7 MR. FASULO: I'm trying to figure out where Ms.
8 Giannelli should be.

9 THE COURT: Yes, that was the issue I was going to
10 address with both of you. It seems to me -- I know from time
11 to time when you're in the middle of the trial, you want to be
12 conferring with your witness so shouldn't Ms. Giannelli be in
13 the front row right next to where you are?

14 MR. FASULO: That would be ideal, Judge, if we could
15 take the yellow --

16 THE COURT: Oh, you mean that's blocked off?

17 MR. FASULO: Yes, but if they could sit in this, that
18 would be perfect.

19 THE COURT: I don't think we're allowed to take it
20 off, given the Covid protocols.

21 MR. FASULO: Because that gives us distance. For a
22 lot of different reasons, we feel it's much better there,
23 especially if I'm going to move here. I don't really believe
24 Ms. Giannelli should be that close to the booth here, and as
25 well, she wouldn't be able to see the witnesses as well.

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1 THE COURT: Well, the only other possibility --

2 MR. FASULO: This is perfect if you can make that
3 happen.

4 THE COURT: I don't have the flexibility to remove
5 that tape. That was put there by the court to maintain the
6 protocols.

7 The only other thing I could suggest is she can sit
8 with you at counsel table, but then your colleague can't.

9 MR. FASULO: Right. Would it be OK with the Court if
10 she sat in the second row? That would be OK with us.

11 THE COURT: Is there tape on it?

12 MR. FASULO: No.

13 THE COURT: Yes.

14 MR. FASULO: The interesting thing is every other row
15 is taped. I'm just curious why it couldn't be every other row,
16 and just change the --

17 THE COURT: Every other row, and what?

18 MR. FASULO: Every other row here is taped.

19 THE COURT: Yes, that's the social distancing.

20 MR. FASULO: Right, which is fine, which I understand.
21 But my point is this is fine if she sits here, but there's no
22 tape on this row.

23 THE COURT: There is or there is not tape?

24 MR. FASULO: There is not any tape.

25 THE COURT: Then she can sit there.

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1 MR. FASULO: OK.

2 THE COURT: If there's no tape, she can sit there, and
3 that's what I was going to suggest.

4 MR. FASULO: That would work perfectly, Judge.

5 THE COURT: And Dr. Fishman, you may want to have him
6 sit in the same row, six feet apart, closer to your table, in
7 case you want to be conferring, but I leave it up to you.

8 MR. SERCARZ: Your Honor (inaudible).

9 THE COURT: Yes. If there's no tape in the row, he
10 certainly can sit there.

11 MR. FASULO: OK. I didn't know how the Court felt
12 about the defendant sitting in that row, but as long as the
13 Court's OK, we're OK with it. That works with us, and if we
14 have to get up, we can always bring paper to her and bring
15 paper back and forth. So we're fine.

16 THE COURT: Is there any issue on this end, from the
17 government's point of view?

18 MS. MORTAZAVI: I'm sorry, your Honor. Regarding the
19 defendants' positions?

20 THE COURT: Yes.

21 MS. MORTAZAVI: No.

22 THE COURT: OK.

23 MS. MORTAZAVI: No issues.

24 THE COURT: Mr. Sercarz.

25 MR. SERCARZ: In the event that, during the course of

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1 the proceedings, I wish to consult with my client
2 unobtrusively, does the Court have any problem if I get up,
3 walk around, and go back and talk? Because I'm comfortable
4 doing it; I just don't want you to feel I'm disrupting the
5 proceedings.

6 THE COURT: Well, you really can't just walk around
7 the courtroom, because then you're getting within six feet of
8 the jurors and all of that, so you really can't do it. You
9 have to tell me you need to confer.

10 MR. SERCARZ: Then that's what I'll do.

11 THE COURT: Are there telephones on counsel table?

12 MR. FASULO: No.

13 THE COURT: No?

14 MR. FASULO: Judge, I'm looking. I can only tell you
15 what I see.

16 THE COURT: No?

17 MR. FASULO: I cannot see one.

18 THE COURT: I'm just surprised, because I spoke to the
19 District Executive yesterday about these issues.

20 Ms. Dempsey, can you make a note.

21 Because what I was told -- Mr. Sercarz, go back to
22 your seat.

23 What I was told was that's how you could confer with
24 your client, that she would be at the table with you, distanced
25 from you, but you could talk to her if you had concerns about

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1 the distance. So I don't know why they're not there.

2 MR. FASULO: Maybe they'll be here tomorrow, Judge,
3 but they're not here.

4 THE COURT: We'll try to look into it once we conclude
5 today, but Ms. Giannelli can certainly move up to that front
6 row, where you're telling me there's no tape, right parallel to
7 your table.

8 MR. FASULO: Yes.

9 THE COURT: And Dr. Fishman is welcome to come up and
10 do the same. You're welcome to do so, sir.

11 MR. FASULO: No. We're fine, Judge, with this setup.
12 We're fine with Ms. Giannelli sitting in the second row. We're
13 fine with me sitting over here. So we are ready --

14 THE COURT: OK.

15 MR. FASULO: -- in terms of the defense and logistics.

16 THE COURT: All right. So that's it in terms of the
17 logistics, except for the phones. We'll look into that.

18 Ms. Mortazavi.

19 MS. MORTAZAVI: And your Honor, just to confirm that
20 the Court is comfortable with this arrangement for the
21 government.

22 THE COURT: Did you move any chairs around, or is that
23 how it was?

24 MS. MORTAZAVI: Ms. Jung, our paralegal, has added a
25 chair at the end so that she can take direction on which

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1 exhibits to publish.

2 THE COURT: I think she's technically too close to my
3 clerk. Is she not?

4 MS. MORTAZAVI: And that's why we sought the Court's
5 permission. We're happy to shuffle things. I have had a
6 trial, your Honor, where one of the assistants sat against the
7 wall to create some distance, but Ms. Jung does need to be
8 seated at that position. I understand IT has already
9 configured her computer so that she can connect to the network
10 there.

11 THE COURT: All right. I'm fine with it if everybody
12 who is a participant is fine.

13 MR. SERCARZ: Your Honor, Dr. Fishman has just come
14 forward to advise us that he wishes to be seated at counsel
15 table.

16 THE COURT: Well, he can't be. One of you has to
17 vacate your seat to give him a seat. That's all we can do.

18 MR. SERCARZ: We'll work with it as is, your Honor.

19 THE COURT: Either one of you has to move from there
20 or he has to move.

21 MR. SERCARZ: Mr. Fernich is invaluable to me, your
22 Honor.

23 THE COURT: Well, you have to talk to your client
24 then.

25 MR. FERNICH: One moment, your Honor?

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1 THE COURT: Yes.

2 MR. FERNICH: I apologize.

3 THE COURT: Somebody is hitting the microphone.

4 MR. FERNICH: Your Honor, my understanding from
5 cocounsel, I'm not personally privy to this, is that the
6 executives or the people in charge of the logistics here in the
7 court, cocounsel's enhanced my understanding that we're
8 permitted to have three at the table. I don't know if I'm
9 misinformed about that.

10 THE COURT: I think you are, since the chairs are
11 where the chairs are.

12 MR. FERNICH: OK. If your Honor could, I don't mean
13 to --

14 THE COURT: Yes, we'll check on it. We'll check on
15 it, but I don't think that's going to be the case.

16 MR. FERNICH: It certainly wouldn't be the first time.

17 THE COURT: OK. Anything else on logistics?

18 All right. You all understand that the rules are --
19 I'm going to try to get this moved a little bit so that I have
20 a better sight line -- when you are questioning a witness or
21 giving your opening statement, you go to this lectern, in the
22 box, which has the HEPA filter, and you can remove your mask
23 while you are speaking from inside that box. Before you leave,
24 put it back on so that you don't pass by Mr. Fasulo or his
25 colleague or Mr. Sercarz too closely.

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1 The witness, when they take the witness stand, also
2 can remove his or her mask, because again, we have this HEPA
3 filter setup that will get the air out of here and, I guess,
4 spew it all over me. I thought it was supposed to go
5 somewhere, but anyway, the witness does not have to be masked.

6 Throughout the trial, all of the jurors need to wear
7 their masks, as does everyone else in the courtroom. People
8 need to maintain social distancing in the gallery area. We've
9 alerted the District Executive's office that there has been
10 some interest in this trial, and there may be media coverage,
11 so there will be an overflow courtroom where things will be
12 streamed in through Teams. I think the overflow courtroom, if
13 I'm not mistaken, is my own courtroom downstairs. So if some
14 of you have colleagues, family, they're welcome to be here if
15 they get here early enough to get a seat, and if not, there is
16 the overflow courtroom where people can be. OK?

17 Let's talk about and finalize everything with respect
18 to jury selection.

19 I have a couple of questions that I want to just
20 confirm with people, and in the meantime, Ms. Dempsey and my
21 clerk, Ms. Popper, who will be with me throughout the trial --
22 you all should get to know both of them if you don't know them.

23 This is Ms. Popper, my law clerk. And I think you all
24 know Ms. Dempsey, and I intend to introduce them to the jurors
25 as well before we get going tomorrow.

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1 We have taken what was tab 7 in the binder that was
2 submitted to me last week plus I received from -- I think the
3 letter came from Mr. Fasulo with some additional questions that
4 the defendants wanted me to add.

5 Yes, a January 14 letter with ten additional
6 questions. I am going to ask all ten of those questions that
7 have been requested by the defendants. We've pulled them into
8 the document that you gave us.

9 Are all parties now in agreement that that set of
10 proposed voir dire questions are acceptable?

11 MR. SERCARZ: Yes, your Honor, on behalf of
12 Dr. Fishman.

13 MR. FASULO: On behalf of Ms. Giannelli, yes, your
14 Honor.

15 THE COURT: Thank you.

16 MS. MORTAZAVI: Your Honor, as you know, we had
17 objected to two of the questions, but we understand the Court's
18 ruling on that and have no further arguments.

19 THE COURT: All right.

20 So what we've done, we've pulled them all together.
21 We have a document that we're going to give you. I've made
22 some edits. They're relatively minor. Frankly, I think for
23 the most part they're nonsubstantive, but I will hand out to
24 you now the document. This is the composite of the tab 7 and
25 Mr. Fasulo's letter. I am planning that we will hand these out

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1 to the venire.

2 We will have 82, I think I was told, prospective
3 jurors. That's all that will fit in the jury assembly room and
4 upstairs. Hopefully we won't have any issues, and we'll be
5 able to get a pool of jurors from which we can pick our jury.
6 We need a total of 36 people after I screen people with you
7 for, first, hardship and, second, for cause against whom then
8 you'll all exercise your peremptory challenges.

9 I'm going to go through this with you in a minute to
10 just point out some of the changes that we've made. I wanted
11 to just confirm that -- it's not in this document, but I want
12 to confirm that the case summary that was contained in the
13 letter I received over the weekend from the government has been
14 signed off on by all parties.

15 Ms. Mortazavi, obviously, the government is in accord.
16 Correct?

17 MS. MORTAZAVI: Certainly that's the government's
18 proposal after having conferred with defense counsel, your
19 Honor, and I'm just reviewing the summary of the case on pages
20 8 and 9 of the documents that you circulated. I see that
21 they're -- I just want to confirm with the Court that the
22 proposal the government put forward was adopted. I see some
23 language that I recall defense counsel having objected to here.

24 THE COURT: Hold on one second.

25 All right. I thought we pulled in what was in the

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1 letter from you over the weekend, Ms. Mortazavi.

2 MS. MORTAZAVI: And I do recognize some of the
3 changes, your Honor, so as to this version, the government has
4 no objection. And I'll leave it to defense counsel if they
5 want to comment further on it, but no issues from the
6 government's perspective.

7 THE COURT: All right. Give me one moment.

8 Ms. Mortazavi's letter represented to me that
9 defendants had seen it and signed off on it, I thought, or were
10 silent, and silent is deemed by me to be consent.

11 MS. MORTAZAVI: That's correct, your Honor, and so I
12 will stop speaking and let the defense counsel speak.

13 THE COURT: All right. Fair enough.

14 I will tell you that I did make a couple of modest
15 edits to what was in Ms. Mortazavi's letter consistent with
16 what I had said on the record last week. So let me, for
17 example, find what was submitted, where Ms. Mortazavi was
18 proposing to say Fishman is charged with agreeing with others
19 to distribute adulterated and misbranded performance-enhancing
20 drugs, also referred to as PEDs.

21 I mean I told you that I thought things were a little
22 redundant in that respect, and I've taken the liberty of taking
23 out those labels, but otherwise --

24 Mr. Fasulo.

25 MR. FASULO: Judge, we worked with the government on

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1 this, and we agree with the language that currently exists on
2 page 8 and 9 of your proposal, of your voir dire document.

3 THE COURT: OK.

4 MR. FASULO: So we are in agreement.

5 THE COURT: All right. Thank you.

6 Mr. Sercarz.

7 MR. SERCARZ: Can I have one moment?

8 THE COURT: Sure.

9 Just so everyone is clear, it is not my contemplation
10 that what I give to the prospective jurors is going to contain
11 this text. I'm going to read this.

12 MR. SERCARZ: Yes.

13 THE COURT: OK.

14 MR. FERNICH: Your Honor, (inaudible) just so that
15 we're clear that on pages 8 and 9 on the thicker submission,
16 the description of the charges, that this is intended to be a
17 thumbnail sketch of what the indictment alleges, we don't --
18 this is not intended to be a formal instruction as to what the
19 elements of the charges are, which is going to come at the end
20 of the case and which we've already had some written
21 submissions about and which we'll have more to say about later,
22 ahead of the Rule 30 conference; with that caveat, we believe
23 that this accurately summarizes the content of the indictment,
24 although we have some disagreement about the elements of the
25 offense, particularly, the last clause on each of the two

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1 paragraphs, spread across pages 8 and 9, but I don't think it's
2 necessary to go through that now.

3 THE COURT: No, no, no. Be specific what you're
4 talking about, and if you're objecting, I want to know what the
5 objection is.

6 MR. SERCARZ: Your Honor --

7 MR. FASULO: Judge, I apologize, but because the
8 direction of the speech is towards the Court, it's really
9 helpful if we can have the mikes used.

10 THE COURT: Yes. You should just remain seated. All
11 right? Remain seated and pull the microphones to your mouths,
12 especially for today.

13 MR. SERCARZ: It is our contention, your Honor, and
14 you will hear this repeated throughout, that the relevant --

15 THE COURT: You don't have to speak louder now that
16 you're using the mike. OK?

17 MR. SERCARZ: I'll get the hang of it.

18 -- that the relevant intent is the intent to defraud
19 or mislead as to the adulteration and misbranding and not the
20 intent to enhance the performance of thoroughbred racehorses,
21 as suggested by this recitation in the questionnaire. And it's
22 going to come up periodically. I wanted the Court to be aware
23 of the distinction that we make.

24 THE COURT: All right. I understand what you're
25 saying now. Thank you.

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1 I need to go back and look at the indictment itself,
2 because this does purport to be a summary of the indictment,
3 not acquiescing in it in any way. So if this is what the
4 indictment says, then it's going to stay. If the indictment
5 reads otherwise, it will get changed.

6 MR. SERCARZ: Thank you, your Honor.

7 THE COURT: Ms. Mortazavi, do you want to say anything
8 at this point?

9 MS. MORTAZAVI: No, your Honor.

10 THE COURT: All right. But I'd like you to please go
11 back and look at that.

12 MS. MORTAZAVI: Certainly.

13 THE COURT: All right.

14 OK. I had not, frankly, intended to give you all this
15 document, but I guess it's just as well so that you have the
16 summary of the case. This is my master script, which I'm going
17 to collect back from you before we leave.

18 The voir dire questions that you have in front of you
19 is what I intend to have the jury administrators hand to the
20 jurors once we get going, and the way things are going to
21 work -- I don't know if you've all seen the jury assembly room.
22 If you haven't, you might want to stop down there just to get a
23 sense of it. Everything is different in the age of Covid, and
24 it's not an ideal arrangement, to be perfectly candid with you,
25 but the way it is set up is there are 40 or 42 chairs in the

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1 jury assembly room, and then there's the overflow room upstairs
2 with another 41 or 42 seats piped in. We'll have a big screen
3 so the people upstairs can see what's going on downstairs.

4 There are two microphones in the front of the jury
5 assembly room. If it were only a one-defendant case, we could
6 have jurors come up two at a time to a center table with
7 counsel on either side, but because there are two defendants
8 here, you're going to need those tables -- obviously one for
9 the government and one for each of the defendants and their
10 counsel.

11 Ms. Fasulo will be all the way on the right, and she
12 should be closest to the window for reasons we talked about
13 last week.

14 MR. FASULO: Yes, Judge.

15 THE COURT: And that way she's distanced from
16 everybody else.

17 MR. SERCARZ: You meant to say Ms. Giannelli, your
18 Honor. You said Ms. Fasulo.

19 THE COURT: I'm sorry. I meant Ms. Giannelli, yes.
20 Mr. Fasulo is fine.

21 Then what we're going to have to do is we can't put
22 jurors in the box the way you would typically do, because
23 there's just not room with the social distancing. So we'll
24 give everyone these questions. I will tell them that it is
25 important that everybody pay attention and that they follow

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1 along with me, because I am not going to repeat the questions.
2 I'm going to call up the first two jurors and go through these
3 questions one by one with them. Then the next two will come
4 up, and I will ask them, are there any of the questions that I
5 asked to which your answers would be yes, and they can tell me.
6 And as needed, we'll go over them and do sidebars.

7 There's kind of a screened-off area where counsel and
8 I can confer and deal with sidebars and talk about whether
9 people need to be excused for cause or -- obviously, hardship
10 I'll deal with. If we need to confer, we'll confer. All
11 right?

12 And then we'll go through these questions. We need to
13 get 36 prospective jurors, because we've talked about having
14 four alternates instead of two. That means that the strikes
15 are, as I think set forth somewhere on here, but in any event,
16 you know the way it works, six for the government, ten for the
17 defendants.

18 What I need to understand from the defendants ahead of
19 time is are you jointly exercising your ten, or are you doing
20 five and five? Have you talked to each other?

21 MR. FERNICH: Give us two minutes for that?

22 THE COURT: Yes. Go ahead.

23 MS. MORTAZAVI: Your Honor, you had mentioned this at
24 our last conference. Is it the case that we will have
25 additional peremptory challenges.

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1 THE COURT: Yes.

2 MS. MORTAZAVI: Very good.

3 THE COURT: You mean for the alternates.

4 MS. MORTAZAVI: Yes.

5 THE COURT: Yes.

6 MS. MORTAZAVI: OK.

7 THE COURT: I'm going to get to that in a minute.

8 MS. MORTAZAVI: Thank you, your Honor.

9 MR. FASULO: Judge, we've conferred, obviously. We're
10 going to do joint, that will be joint ten challenges.

11 THE COURT: All right. Terrific. Thank you.

12 And then with regard to the four alternates, you get
13 your, you know, standard number plus, because we're doing four,
14 I think you get two additional per side under the rules.
15 Right? No issues?

16 MR. FASULO: That's my understanding, Judge.

17 THE COURT: OK. So that's how we will be proceeding.

18 Let me just quickly walk you through. Really, I think
19 you want to just look at the boiled down sheet, although it
20 doesn't have page numbers, and I guess we should fix that for
21 tomorrow.

22 MR. FASULO: Judge, if I may, just for clarity?

23 THE COURT: Yes.

24 MR. FASULO: Because I just want to keep on
25 (inaudible). Can the Court tell me how many jurors we're going

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1 to speak to at one given time before we begin to exercise, or
2 are we going to do the whole upstairs, downstairs panel and
3 then make our challenges?

4 THE COURT: Who keeps hitting the mike?

5 MR. FASULO: Me, of course, Judge.

6 THE COURT: Please try and be careful.

7 MR. FASULO: I'll try and be careful. I promise.

8 THE COURT: OK.

9 MR. FASULO: I just want to know how the Court goes
10 about the jury selection. I have not had an opportunity to try
11 cases in this courtroom.

12 THE COURT: Well, we need to get 36 that haven't been
13 excused for hardship or cause. Once we have that --

14 MR. FASULO: Work with the 36.

15 THE COURT: -- we'll work with the 36.

16 MR. FASULO: Perfect.

17 THE COURT: If people get excused beyond the initial
18 41 that are downstairs because of hardship or cause, then we'll
19 have to bring people down and they'll come up and we'll do the
20 questioning. But once we have a group of 36 people that have
21 been cleared for hardship or for cause, then we're good to go.

22 MR. FASULO: Right. And then my question then really
23 was once we have that 36, if, during the questioning, the
24 Court, whatever happens --

25 THE COURT: Then we have to bring people down.

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1 MR. FASULO: -- we'll bring people down, and then
2 we'll continue with that 36.

3 THE COURT: Correct.

4 MR. FASULO: And then we'll make our challenges.

5 THE COURT: Correct.

6 MR. FASULO: That was what I wanted to understand,
7 that we're bringing people into the mix, even if they may be OK
8 initially, but at some point --

9 THE COURT: Yes. If somebody goes for hardship or
10 cause, before your peremptories --

11 MR. FASULO: Whatever.

12 THE COURT: -- they get substituted --

13 (Indiscernible overlap)

14 MR. FASULO: That's perfect for me.

15 THE COURT: OK.

16 A couple of things to finalize about the questionnaire
17 before we turn to finalizing voir dire. I need a list from
18 somebody of the names and the locations that the jurors are
19 likely to hear about.

20 Who is preparing that?

21 MS. MORTAZAVI: The government will provide a copy
22 this evening, your Honor.

23 THE COURT: All right. Have you shared that with
24 defendants?

25 MS. MORTAZAVI: No, but we will, and then we will

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1 circulate it to the Court.

2 THE COURT: All right. But it can't be too late, Ms.
3 Mortazavi, because I've got to pull it into the document and
4 get the document copied for the prospective jurors for tomorrow
5 morning.

6 MS. MORTAZAVI: Understood.

7 THE COURT: OK.

8 MR. FASULO: So we're assuming that anywhere where
9 it's gray, we're assuming anywhere it's gray, it's going to be
10 (inaudible) same color.

11 THE COURT: Yes. That's just a reminder for me to
12 talk to you about --

13 MR. FASULO: I figured that. I just wanted to bring
14 it to the Court's attention.

15 THE COURT: Yes.

16 All right. Let me walk you through quickly -- there
17 are questions that said something like "do you have an opinion"
18 that I just tinkered with the wording to say "do you believe."
19 I'll go through one by one, but I guess, as I said to you,
20 really nothing that I've done has been terribly substantive. I
21 don't intend to have the follow-up questions asking is there
22 anything about your, let's just say, have you ever attended a
23 horse race; is there anything about that that would prevent you
24 from participating fairly and impartially? I'm not going to
25 print that every time on this questionnaire, as you'll see, but

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1 obviously, I know to ask the follow-up.

2 Let me just go through.

3 Question 52, Ms. Mortazavi, the people you would like
4 to have introduced, obviously, you, Mr. Adams, Mr. Chow and --
5 I'm sorry. Spell your paralegal's name.

6 MS. MORTAZAVI: Yes, your Honor. Karline Jung.
7 K-A-R-L-I-N-E, last name J-U-N-G.

8 And we would also ask that the names of the case
9 agents be read, which I'm happy to read into the record now or
10 email to you.

11 THE COURT: We have Ms. Jung on No. 53. Do we have
12 the agents' names correct?

13 MS. MORTAZAVI: They are correct, your Honor.

14 THE COURT: All right. Thank you.

15 All right. Paragraphs 54 and 56 and 57, if the
16 defendants and their counsel would please look at those and
17 tell me if you're fine with those.

18 MR. FASULO: Yeah. Judge, on 57 I would ask that you
19 add Sean McCabe, who will be sitting at counsel table, from the
20 firm of Fasulo, Braverman & DiMaggio.

21 THE COURT: OK. And I'm sorry. Is he a lawyer or
22 paralegal?

23 MR. FASULO: He's almost a lawyer. He's a legal
24 specialist. He's awaiting admission.

25 THE COURT: OK.

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1 MR. FASULO: We call him a legal specialist.

2 THE COURT: But I'm a stickler. I'm not going to
3 introduce him as counsel.

4 MR. FASULO: No, no, no, no.

5 (Indiscernible overlap)

6 THE COURT: OK.

7 Mr. Sercarz, paragraph 56.

8 MR. SERCARZ: There's no one else who's going to be
9 sharing space with us, your Honor. That will do it.

10 THE COURT: OK. Thank you.

11 MR. FASULO: Oh, I'm sorry, Judge. One other thing.

12 THE COURT: Yes.

13 MR. FASULO: I don't know why this gets picked up, but
14 Alex Huot is not of the law firm of Jay Goldberg, P.C. He's
15 with the law firm of Bobbi Sternheim.

16 THE COURT: Oh.

17 MR. FASULO: Since he's not going to be in the
18 courtroom, I don't know that it's necessary.

19 THE COURT: No, but I think since he's going to be
20 working with your team --

21 MR. FASULO: Yeah. He's with Bobbi Sternheim.

22 THE COURT: OK.

23 All right. So we'll make those edits.

24 MR. FASULO: Thank you. Nothing else from the
25 defense.

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1 THE COURT: And you are fine with Ms. Giannelli was
2 formerly known as or also known as Lisa Ranger.

3 MR. FASULO: Ranger.

4 So, yes, Ms. Giannelli, as named in the indictment, or
5 formally known as Lisa Ranger --

6 THE COURT: Ranger.

7 MR. FASULO: Since the case started, she's no longer
8 Lisa Giannelli. She is currently Lisa V-O-S-H-E-L-L, so that
9 may be relevant.

10 THE COURT: Voshell. OK. I think we need to fix that
11 as well.

12 MR. FASULO: For purposes of the trial, we're going to
13 address her -- I think all the documents are in Lisa
14 Giannelli's name.

15 THE COURT: Yes, but I think there are some documents
16 or some mention somewhere of Ranger.

17 MR. FASULO: Yes. No. Ranger or Giannelli, but we're
18 not planning on using both her names for the purpose of these
19 questions.

20 THE COURT: OK.

21 MR. FASULO: -- more complex than it already is.

22 THE COURT: OK.

23 Turning over to question 66, you'll see this series of
24 questions I've made some edits. I don't like the idea of
25 instructing the venire in the context of jury selection, so I'm

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1 taking out some of this language that was proposed: "I
2 instruct you that using a cooperating witness is perfectly
3 legal." That was proposed by the government. Same thing with
4 question No. 68. That's why we've given you the more
5 comprehensive document and made it clear what I've stricken.
6 And it really starts with 66. So I'll give you a few moments
7 to look at that just so you see, but that is what I'm doing.
8 I'm not really asking for edits.

9 MR. FASULO: Judge, from Ms. Giannelli's point of
10 view, I've read over the 67, I think, questions --

11 THE COURT: Yes.

12 MR. FASULO: -- 68 questions. There are no objections
13 to the voir dire as proposed by the Court.

14 THE COURT: Thank you.

15 MR. FERNICH: No objections by Dr. Fishman.

16 THE COURT: All right.

17 Do you need time, Ms. Mortazavi?

18 MS. MORTAZAVI: No. No objections from the
19 government, your Honor.

20 THE COURT: All right. So then if you would all
21 please hand me back this master document that shows you the
22 edits I've made. If you want, you can keep the shorter
23 document, although obviously we need to make minor tinkering to
24 reflect the fixing of the names and pull in the witnesses, the
25 locations and the list of names.

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1 MR. SERCARZ: Your Honor, there is a question that we
2 had, defense counsel had, which we do not really answer, and it
3 deals with the question of juror vaccination. I, frankly,
4 don't recall that we resolved this at the initial pretrial
5 conference, but the questions are is the Court going to inquire
6 into the vaccination status of the prospective jurors, and is
7 it going to do so in front of all the parties or *ex parte*?

8 THE COURT: I was not intending to inquire. That's
9 what you thought? Is that what you said?

10 MR. SERCARZ: Yes, that was what I thought you said,
11 but I didn't see it in the transcript.

12 Thank you.

13 THE COURT: Is there any comment by anyone with
14 respect to that?

15 I know some judges do ask, but, frankly, I think
16 people have privacy rights that I believe should be respected
17 unless I hear otherwise.

18 MR. FASULO: Judge, I have no objection to that.
19 However, I'm just curious, taking this one step further. What
20 happens if a juror who is selected has that question in terms
21 of the other jurors that are sitting amongst them?

22 THE COURT: Well, they're all socially distanced at
23 all times. If you see the jury box has been -- you do
24 understand that that section there is --

25 MR. FASULO: That'll be the response of the Court,

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1 that we socially distance.

2 THE COURT: Yes.

3 MR. FASULO: -- not requiring --

4 (Indiscernible overlap)

5 THE COURT: Correct. And when they take their
6 breaks -- I mean I spent the afternoon after our last
7 conference reviewing all the space. The jurors are taken by
8 court staff to two separate rooms, where they are not even
9 allowed to -- I mean, there are marks on the table where they
10 have to sit, and they are all completely socially distanced.
11 Some of them are in their own little cubby room, separated from
12 each other. So they will not be -- and the same is true when
13 they're deliberating. They will not be closer than six feet to
14 each other, and they have to wear their masks, unfortunately.

15 MR. FASULO: That's fine. So that would be the
16 Court's response, and I'm fine --

17 THE COURT: Yes.

18 (Indiscernible overlap)

19 MR. FASULO: I just wanted to play out in my head that
20 situation if a juror had an issue.

21 THE COURT: Yes.

22 MR. FASULO: Very well.

23 THE COURT: That's how we'll be taking it.

24 Now, the final thing I just want to talk to you
25 about -- has everyone given back that master document?

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1 OK. The final thing I just want to make people
2 understand, because different judges do things different ways,
3 we're going to use the struck jury method, and it is the
4 Court's plan to give you each a sheet that will have the
5 numbers of the jurors on it. We'll break once we have the 36.
6 We'll have a separate room for the defendants and a separate
7 room for the government in the back here, and you can
8 physically strike on that sheet the appropriate number of
9 people from the jury pool first. Then, separately, you'll do
10 the strikes with respect to the alternates, and the first 12
11 who are not stricken will be our jury and the first four who
12 are not stricken from the alternate group will be the
13 alternates.

14 Any questions?

15 MR. SERCARZ: Yes, your Honor. When in the process do
16 you include challenges for cause?

17 THE COURT: Early on, before we get to the settling on
18 the 36.

19 MR. SERCARZ: OK. I thought you were going to -- oh,
20 all right. I see.

21 Thank you, your Honor.

22 THE COURT: As we go through the questioning, if
23 there's need for a sidebar, you know, then I'll hear from each
24 of you, from each side. If you think someone should be
25 stricken for cause, you'll say that to me and then I'll hear

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1 from the government, and then I'll rule. OK?

2 MR. FASULO: Ms. Giannelli has no objection.

3 Judge, you mentioned sidebar. I guess you'll get to
4 this. I understand the sidebar downstairs. I've been familiar
5 with that room.

6 THE COURT: Yes.

7 MR. FASULO: I'm questioning now the sidebar in this
8 courtroom, how we go about that.

9 THE COURT: Right over here. I have to say, given the
10 very limited space and the fact that you're going to end up
11 being too close, really, to my clerk --

12 MR. FASULO: I see.

13 THE COURT: We will do it right over here. I'll come
14 over this way, but you really are going to have to have just
15 one lawyer for each party. It's not going to work for the
16 whole team to come up with the client.

17 MR. FASULO: That's fine, Judge. I just wanted to --

18 THE COURT: Yes.

19 MR. FASULO: -- looking at this space.

20 THE COURT: Sure. No. That's fair. I mean none of
21 this is ideal. You're right, Mr. Fasulo.

22 Mr. Adams, did you have something?

23 MR. ADAMS: Your Honor, only to say that we're going
24 to try at every break to forecast as many issues as might arise
25 as possible to minimize sidebars.

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1 THE COURT: Yes. Well, I thought -- yes, I'm going to
2 talk to you in a few minutes about rules for the conduct of the
3 trial, and that will be one of them. But you anticipate, to
4 the extent you can, every time we have a break you can talk
5 about issues so that we can excuse the jurors and we can do it
6 without having to come up to sidebar. But we'll talk about all
7 of that in a moment.

8 Any other questions or comments on selecting the jury?

9 MR. FASULO: None from defendant Giannelli.

10 THE COURT: Mr. Sercarz.

11 MR. SERCARZ: No, your Honor. Thank you.

12 THE COURT: Ms. Mortazavi.

13 MS. MORTAZAVI: None from the government.

14 THE COURT: All right.

15 Let me just be clear. Are you taking the lead, Ms.
16 Mortazavi? Should I be calling on you first?

17 MS. MORTAZAVI: Depending on the issue, your Honor.

18 THE COURT: Tomorrow, for example, jury selection.

19 MS. MORTAZAVI: And I think that also could be a
20 matter up for discussion, but we will --

21 THE COURT: All right. You'll let me know. OK.

22 MR. ADAMS: We will take a lead person.

23 THE COURT: All right. Look, I don't want to be
24 disrespectful to either of you, but what I'm saying is it
25 appears Mr. Fasulo is the lead for Ms. Giannelli.

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1 Mr. Sercarz, am I correct that you're taking the lead?

2 MR. SERCARZ: You're correct.

3 THE COURT: OK. For Dr. Fishman. OK.

4 All right. Let me just talk to you about a couple of
5 other things, then. I have a request from Dr. Fishman's
6 lawyers to bring electronic devices into the courthouse. If
7 anybody else has one, it behooves you to get it in quickly
8 because I can't control how quickly the District Executive's
9 office acts on these things.

10 MR. FASULO: We have ours in as well, Judge.

11 THE COURT: OK.

12 MR. FASULO: We filed yesterday --

13 THE COURT: Ms. Mortazavi.

14 MR. FASULO: We filed yesterday with the wrong number,
15 and we refiled it today.

16 THE COURT: OK.

17 (Indiscernible overlap)

18 MS. MORTAZAVI: And your Honor, I spoke with Ms.
19 Dempsey this morning --

20 THE COURT: OK.

21 MS. MORTAZAVI: -- and she's indicated that we did not
22 need an order, but we're happy to submit one if the Court
23 requires it.

24 THE COURT: Whatever the rules are that she told you.
25 She knows these things better than I do.

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1 MS. MORTAZAVI: Very good, your Honor.

2 THE COURT: OK.

3 All right. I'm told by the jury administrator that
4 you are supposed to -- I just want to put this out there -- at
5 the close of the evidence provide to the Court a thumb drive
6 with a copy of all of the evidence that has been introduced.
7 All right? So that both sides understand that?

8 MS. MORTAZAVI: Yes, your Honor.

9 THE COURT: Mr. Fasulo, any questions? Do you
10 understand?

11 MR. FASULO: I understand, Judge. We'll give a thumb
12 drive of all the exhibits that have been entered into
13 evidence --

14 THE COURT: Right.

15 Mr. Sercarz, OK/

16 MR. SERCARZ: Understood. Understood.

17 THE COURT: All right.

18 When is the government going to be getting me your
19 exhibits, your exhibit list, your 3500 materials? Or are you
20 intending to give me binders?

21 MS. MORTAZAVI: Yes, your Honor. We're preparing
22 hard-copy binders, and they're ready to be delivered to the
23 Court tomorrow.

24 THE COURT: And you intend to hand them to the Court
25 witness by witness?

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1 MS. MORTAZAVI: We were going to provide the Court
2 with a full set of the 3500 materials and the exhibits.

3 THE COURT: That's what I expected, yes.

4 And I'll get them when?

5 MS. MORTAZAVI: Tomorrow, your Honor. Our paralegals
6 are diligently working to put those together.

7 THE COURT: OK.

8 Does the government have an estimate of how long you
9 anticipate your opening to be? Have the parties discussed
10 this?

11 MS. MORTAZAVI: We have not discussed it with defense
12 counsel. The government anticipates 20 minutes.

13 THE COURT: I'm sorry?

14 MS. MORTAZAVI: 20 minutes, your Honor.

15 THE COURT: OK.

16 And defendants.

17 MR. SERCARZ: 15, your Honor, for Dr. Fishman.

18 MR. FASULO: Five minutes, five to ten minutes, Judge,
19 for Ms. Giannelli.

20 THE COURT: OK. All right. If we have a jury in
21 place, it's the Court's expectation that we're doing opening
22 statements tomorrow. OK?

23 All right.

24 MR. FASULO: No objection.

25 On that note, Judge, can I ask one other question?

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1 THE COURT: Of course.

2 MR. FASULO: If we have a jury in place and we do do
3 opening statements tomorrow, are we also going to go into
4 witness testimony tomorrow?

5 THE COURT: Depending on the timing, yes.

6 MR. FASULO: OK. Just so we can get --

7 THE COURT: Are you going to have a witness ready?

8 MR. FASULO: -- from the government and we know which
9 witnesses they're putting on so we are not surprised at the
10 last minute.

11 Thank you.

12 MS. MORTAZAVI: Yes, your Honor. We have a witness
13 available tomorrow afternoon, should we proceed.

14 THE COURT: OK. And you'll provide notice to the
15 defendants.

16 MS. MORTAZAVI: We've already discussed the order of
17 our witnesses, depending on whether we commence witness
18 testimony Wednesday or Thursday.

19 THE COURT: OK.

20 All right. And how are the parties planning to handle
21 the stipulations that you've been mentioning to me?

22 MS. MORTAZAVI: With respect to reading them into
23 evidence, we will plan to do that throughout the proceeding.

24 THE COURT: Just as it goes in the flow of your case
25 presentation.

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1 MS. MORTAZAVI: Yes.

2 THE COURT: OK.

3 All right. Ms. Mortazavi, do you have a general sense
4 of how long you anticipate the government's case will take?

5 MS. MORTAZAVI: I assume, your Honor, if we begin
6 Wednesday -- it's difficult to predict the cross-examination,
7 particularly with two defendants and two sets of defense
8 counsel, but we anticipate perhaps ten full trial days.

9 THE COURT: OK. And you'll update us as you're going
10 along how you're doing, because I do intend to say to the
11 jurors that we think this case will last roughly 15 trial days,
12 three weeks, and that we should be finished by whatever that
13 date is, but obviously I can't guarantee it. But we will try
14 to keep them updated throughout the course of the trial on how
15 we're doing in terms of our anticipated schedule.

16 I think I talked to you all last week about the fact
17 that we will conduct trial every day from 9:30 -- I may have
18 said five, but after talking with the jury administrators,
19 they're recommending 4:30-ish. We'll see. But that's the
20 ballpark, full days 9:30 to 4:30, 5:00 every day.

21 We'll do lunch every day from 12:30 to 1:30. It has
22 to be at that time. I mean, obviously, if you're in the middle
23 of a sentence, I'm not going to say we're breaking now for
24 lunch, but the court staff needs to know. I think you know we
25 bring lunch in for the jurors during Covid to try to cut down

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1 on people being outside and mixing. So I need to give them
2 some sense of what we're aiming for. So we're talking roughly
3 12:30 to 1:30 for lunch, and then a midmorning and a
4 midafternoon break. If there are things we need to talk about
5 when we break, if you would please try to give me a heads-up so
6 that, as somebody mentioned, we can cut down on the need for
7 sidebars.

8 We'll start with the jury at 9:30 every day. I will
9 be available then at 9:00 each day for any discussions that we
10 need to have. Obviously if something comes up that's more
11 significant -- I hope it doesn't -- but if that happens, we can
12 adjust and meet slightly earlier than that. I would need you
13 to let me know each day if there are significant enough things
14 that you anticipate you need to start before 9:00. Otherwise
15 we'll do 9:00 each day. I'll meet with you all and we'll deal
16 with anything that might arise. If there's nothing, you can
17 all go get another cup of coffee and I'll see you back at 9:30
18 when the jury resumes.

19 All right. There are not any holidays that I'm aware
20 of that are during the period that we're going to be on trial,
21 so there's nothing that we need to deal with with that.

22 In terms of trial procedures, just a reminder, when
23 you're questioning the witness, you need to stay in that box,
24 especially during the era of Covid. You cannot be walking
25 around here next to counsel table, in front of the jury. I

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1 know lawyers like to sometimes be dramatic and all, but you
2 have to stay in that Plexiglas enclosure there.

3 I would ask that you please stand when the jury enters
4 and leaves the courtroom. I know some judges during Covid have
5 said don't do that, but I think the jury's entitled to that
6 much respect from all of us. So I'd ask you to please do that.

7 Also, I will not tolerate speaking objections. If you
8 have objections, just say objection and I will rule. If I need
9 to hear from you, I'll let you know. OK?

10 I believe that is it in terms of logistics.

11 The final thing I have is to talk to you about the
12 letters that I got from everybody over the weekend with respect
13 to the *in limine* motions.

14 There is nothing in the letters I received that
15 changes my view with regard to the death of the horse in
16 Delaware. That's off limits. It's acceptable to talk about,
17 as you know, I think I ruled last week about the fact that
18 there was an investigation. There was a complaint. You've
19 told me you have a stipulation for how you're going to handle
20 what the outcome of that was, so that is my ruling.

21 With regard to the experts, I would like to better
22 understand the statement in the letter that I got. This is
23 ECF-687, although, I think --

24 Mr. Sercarz, is this letter from you?

25 MR. SERCARZ: Yes.

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1 THE COURT: Yes.

2 -- where you say on January 10, the government
3 provided defense counsel with a substantial additional trove of
4 3500 material. Would you define a trove, additional trove,
5 substantial additional trove.

6 MR. SERCARZ: Your Honor, I'm making an estimate here,
7 but there are now 35 witnesses for whom 3500 material has been
8 provided. Of those I would estimate that we have received
9 additional 3500 material for approximately a quarter of the
10 witnesses, and the number of additional exhibits that we have
11 received ranges from one or two up to 10 or 15 exhibits.

12 I will hasten to add that in those cases where there
13 are multiple exhibits, very often they involve a series of
14 photographs. With regard in particular to Dr. Cole, for
15 example --

16 THE COURT: Yes, that's what we're talking about.

17 MR. SERCARZ: All right. Well, the trove that I
18 described refers to the general proposition --

19 THE COURT: All right.

20 MR. SERCARZ: -- the number of exhibits of 3500
21 material.

22 With regard to Dr. Cole -- and again, this is an
23 estimate, and the government will correct me -- I would say
24 that we received somewhere in the neighborhood of seven to ten
25 additional items of 3500 material, sometimes including more

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1 than one of these -- I can't call them articles, but these
2 statements of which I provided you the most relevant one,
3 relating to subject matters that it appears she may be called
4 upon to testify about.

5 THE COURT: All right. Here's the Court's ruling. My
6 view with regard to the government's three experts is the same
7 as it was last week. I am not going to preclude them, but the
8 government is on notice that experts cannot invade my province
9 in terms of telling jurors what they think the law is or what
10 they think the statutes that govern here mean, and if they do
11 they're going to be reprimanded in front of the jury. But it's
12 fair ground for these people to opine.

13 Now, the question that remains then is the witness
14 that the defense wishes to call in response to Dr. Cole. And I
15 told you last week that I, frankly, don't understand, and I'd
16 like to hear more about why disclosures were not timely made
17 with respect to -- it's Dr. Fenger, I believe.

18 MR. SERCARZ: Yes, your Honor.

19 MR. FASULO: Judge, (inaudible) Mr. Fishman's case,
20 because the defense, Ms. Giannelli, does not plan on calling
21 any experts.

22 THE COURT: Yes. That's correct.

23 MR. FASULO: Thank you.

24 THE COURT: Thank you, Mr. Fasulo.

25 MR. SERCARZ: Two things, if I may, your Honor?

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1 THE COURT: Yes.

2 MR. SERCARZ: My particular concern about Dr. Cole, as
3 articulated in the letter, did not go so much as to the danger
4 that Dr. Cole would invade the province of the jury; I was
5 making another point in my letter. In my letter, I tried to
6 make the point that the statutes themselves define the term
7 "safe" --

8 THE COURT: Yes.

9 MR. SERCARZ: -- with regard to a drug. And the
10 doctor's article -- may I call it an article -- seemed to
11 suggest an intent on the part of the government to take her
12 through the Equestology product list and have her opine
13 regarding the safety and efficacy of each of those products.
14 And to go even further and to further particularize my concern,
15 there are instances in which she says that they will not
16 qualify as safe because they run afoul of FDA guidance, which
17 is not that objectionable to me, but there are other instances
18 in which she opines as to her view that the products are
19 dangerous to racehorses separate and apart from whatever FDA
20 guidance says about how they need to be manufactured and how
21 they need to be labeled.

22 There are instances in which the chemical content of
23 products are described, and the doctor offers an opinion that a
24 product with this type of chemical content would cause harm or
25 may tend to cause harm to a racehorse. And to me, the argument

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1 I tried to make is that that is independently objectionable not
2 only because it usurps the province of the Court but because it
3 is prejudicial. All the government needs to prove in this case
4 is that there was adulteration and misbranding of the products,
5 not that the products pose an immediate threat to the health
6 and safety of racehorses.

7 THE COURT: Well, but it does have to be with the
8 intent to defraud or deceive somebody.

9 MR. SERCARZ: Here, again, your Honor, I would
10 respectfully submit that the question of whether the product is
11 viewed by an expert as independently dangerous to the horse is
12 independent of the issue of --

13 THE COURT: Yes, I understand.

14 MR. SERCARZ: -- whether or not, in adulterating or
15 misbranding, the defendant's effort was to conceal the fact
16 that he had adulterated and misbranded the product.

17 THE COURT: I understand that last point.

18 MR. SERCARZ: Thank you.

19 THE COURT: You're correct.

20 But you haven't addressed your expert, which is what I
21 asked you about. Why did you not timely comply with the agreed
22 deadlines?

23 MR. SERCARZ: Your Honor, as I indicated, I would seek
24 to offer her only as a rebuttal witness. If I am successful in
25 extracting on cross-examination from the government's witness

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1 or witnesses a definition of VCPR, the
2 veterinarian-caregiver-patient relationship, that I feel is
3 consistent with my understanding and that I can live with from
4 a strategic point of view, I would never call her. But if I
5 find during the course of testimony by government experts that
6 they are offering a view of VCPR that I find is inconsistent
7 with the common knowledge within the profession and which I
8 disagree with, I'm going to be in search of a remedy at that
9 point. And I couldn't -- couldn't -- have met the requirement
10 of expert witness notice as to that until I had some sense of
11 exactly how it is that the government's expert is going to
12 define that relationship.

13 THE COURT: OK. I don't know what the understanding
14 was among the parties about the need to designate expert
15 witnesses and whether excluded from that designation was
16 rebuttal experts, but you certainly seem to have anticipated.

17 So let me hear from the government so I have a better
18 understanding here.

19 MR. ADAMS: Your Honor, two points.

20 First, with respect to Dr. Cole, just to make one
21 additional point clear, the use of the phrase or the term
22 "product" when describing what Dr. Fishman was selling goes
23 directly to one of the issues that Dr. Cole will be addressing,
24 which is these are drugs, not simply that they are -- that they
25 are drugs.

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1 THE COURT: Are you uncomfortable sitting, Mr. Adams.
2 It might work better than standing.

3 MR. ADAMS: If it's OK with you, your Honor.

4 THE COURT: Sure.

5 MR. ADAMS: Thank you.

6 And although Dr. Fishman may be uncomfortable with the
7 testimony comes out insofar as the effect of the products was
8 often deleterious to the horse's health, that just demonstrates
9 that they do have an effect, which goes to the question of
10 whether they were drugs, not merely products.

11 With respect to the rebuttal question, there seems to
12 be some conflation of the notion of whether you need to call
13 the expert versus what that expert would say. And today,
14 sitting here, we don't have any understanding of what
15 Dr. Fenger would say or what her bases for saying it would be,
16 notwithstanding that it's perfectly understandable that
17 Mr. Sercarz might not know today whether he wants to call her.

18 THE COURT: But was your protocol and understanding
19 that the parties had to designate to each other rebuttal
20 experts?

21 MS. MORTAZAVI: Your Honor, we had set a reciprocal
22 expert disclosure -- we had proposed a reciprocal expert
23 disclosure deadline to the Court -- the Court adopted it --

24 THE COURT: Yes.

25 MS. MORTAZAVI: -- and ordered it -- of November 18.

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1 THE COURT: Right.

2 MS. MORTAZAVI: We nonetheless had a conversation with
3 defense counsel, where Mr. Sercarz said he may supplement, I
4 think, a two-sentence letter that he gave us on Dr. Fenger with
5 appropriate materials for an expert disclosure, which include
6 3500 materials provided to her, any reports, within a week; and
7 if not, he was unlikely to call her.

8 THE COURT: And you never got those materials?

9 MS. MORTAZAVI: We've never received any supplemental
10 materials, your Honor. He has known as of at least that date
11 that we were going to call an expert to speak to the
12 veterinarian-client-patient relationship. Certainly before
13 that he knew the contours of the argument that the government
14 would make about establishing an appropriate
15 veterinarian-client-patient relationship. It came up in
16 numerous letters, certainly something the defense could have
17 anticipated. They could have easily met that deadline. They
18 still have not, and I think that's the basis to exclude any
19 rebuttal expert. It's not merely an opportunity to keep an
20 expert in defense's back pocket to be able to introduce at any
21 point in this trial. If there are additional examinations that
22 need to be made of that expert, if there's a *Daubert* hearing,
23 it's going to be very disruptive to do it in the middle of
24 trial.

25 THE COURT: I agree.

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1 Why did you not give her the materials within a week
2 of your letters?

3 MR. SERCARZ: If I'm not mistaken, and I may be, so
4 Ms. Mortazavi will correct me, I did provide the government
5 earlier on with Dr. Fenger's curriculum vitae --

6 THE COURT: That's hardly expert disclosure.

7 MR. SERCARZ: -- and her qualifications.

8 As to what she, as to the content of what she would
9 say on the subject of VCPR, in my conversations with Dr.
10 Fenger, the concept is broad. It is nebulous. It depends on
11 numerous factors, and I did not feel that I was in a
12 position --

13 THE COURT: You mean it's not capable of scientific
14 testing or couldn't meet the *Daubert* standard?

15 MR. SERCARZ: The definition of the VCPR is the
16 subject of scientific agreement. I believe that there's a
17 section in the C.F.R., 21 C.F.R., that defines it, and I'm
18 perfectly comfortable with that. And it is my expectation that
19 any witness called by the government will acknowledge that that
20 is the guidance --

21 THE COURT: That's what you're going to do in
22 cross-examination, Mr. Sercarz. You know, look, I'm sorry,
23 sir, but I said we can deal with that in cross-examination,
24 obviously.

25 MR. SERCARZ: I agree.

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1 THE COURT: I'm bending over backwards here to deal
2 with any potential prejudice, but you're not giving me anything
3 to work with. You blew by the deadline that you agreed to and
4 that the Court ordered. Ms. Mortazavi reached out to you --
5 I'm taking representations as given to me -- reached out to
6 you, and you promised to give her materials within a week and
7 you didn't do that. So absent somebody telling me something
8 different, I am not permitting Dr. Fenger to testify.

9 MR. SERCARZ: I understand, your Honor, and I don't --
10 for the record, I don't quarrel with Ms. Mortazavi's
11 representation.

12 THE COURT: OK. So that is the Court's ruling then.
13 That is all that I have on my agenda for today. Is
14 there anything else that anybody wishes to raise?

15 MR. FASULO: Judge, I just wanted the Court to be
16 aware, I respect the Court, and I understand. I just don't
17 want the Court to think that I'm moving around.

18 THE COURT: It's all right.

19 MR. FASULO: I'm trying to, like, see you, and I don't
20 want to disrespect the Court in any way, so --

21 THE COURT: Not a problem.

22 MR. FASULO: It's a real -- I'm not complaining about
23 it, but it's going to look like I'm a little --

24 THE COURT: I understand. I intend, after we break,
25 to try to see what I can do with these screens too.

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(Indiscernible overlap)

MR. FASULO: -- make sure you understand I'm trying to be respectfully and --

THE COURT: All right. Thank you.

MR. FASULO: -- be in a position to see you better.

MR. SERCARZ: Your Honor, there's another brief issue that I raised with Mr. Adams yesterday, and I told him we would be bringing it up.

THE COURT: OK.

MR. SERCARZ: Mr. Fernich is going to make the argument, but it deals with the reference to camels in many of the items of 3500 materials, the fact that among the exhibits are items of medicine clearly designated for camels, and it involved the question of whether the government has the right to offer quote/unquote camel exhibits as direct evidence of guilt or whether this is "other act" evidence, which would be the subject of our *Huddleston* analysis. And Mr. Fernich can further enlighten the Court.

THE COURT: All right. Before we do that, you said you raised this with Mr. Adams. Did you hear back, or is there a dispute, is my question?

MR. SERCARZ: Yes, there is a dispute.

THE COURT: OK.

MR. SERCARZ: Otherwise I wouldn't raise it. I attempted to resolve -- I wanted you to know that I made an

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1 attempt to resolve it.

2 THE COURT: OK.

3 Mr. Fernich.

4 MR. FERNICH: Yes, Judge.

5 Just briefly, before turning to the camel issue, I
6 want to be clear on the Court's ruling with respect to the
7 expert and make sure that I understood what my friend Mr. Adams
8 said appropriately, if my understanding is accurate.

9 I believe that he said that the expert's testimony, as
10 Mr. Sercarz described it, was necessary on the issue of
11 distinguishing products or articles, on the one hand, from
12 drugs, on the other. The term "drug" has a statutory
13 definition in Section 321 of 21 U.S.C., to mean an article
14 intended for use in the diagnosis, cure, mitigation --

15 THE COURT: Mr. Fernich, I'm sorry. I'm going to
16 interrupt you. We're not going to have you read back the
17 transcript. If you have a specific question, ask the question.
18 But if it's a question to Mr. Adams, do you need to occupy the
19 Court's time?

20 MR. FERNICH: I do not.

21 To the extent that Mr. Adams is arguing that the
22 expert's testimony is needed to differentiate these things, I
23 don't believe we're going to be disputing the issue that the
24 substances in question are drugs.

25 Further, the definition of new animal drug is a purely

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1 objective definition as to whether the substance at issue is
2 generally recognized as safe and effective in the scientific
3 community.

4 THE COURT: Right.

5 MR. FERNICH: In our view, that's the testimony that
6 the expert at issue is qualified to opine upon. And then,
7 transcending that objective inquiry, to drill down into the
8 specifics of these particular drugs at issue and whether they
9 are, in fact, safe or effective is marginally relevant, and its
10 prejudicial effect far outweighs any minimal probative value
11 given the fact that it's an objective inquiry, and all the
12 expert has to say is no, it's not generally so recognized, in
13 my scientific view, as safe and effective, and by definition,
14 these are customized drugs, so they're not going to be
15 generally recognized as safe and effective. And I don't
16 believe there's going to be any dispute on that score either.

17 THE COURT: Mr. Fernich, if there's no dispute,
18 there's no dispute. Then there won't be anything for me to
19 rule on, but I don't really know what the point is of your
20 speech that you just made.

21 MR. FERNICH: The point is that allowing the expert to
22 go beyond testifying that these drugs are not generally
23 recognized as safe and effective in the community to the
24 specifics of each particular drug and trotting out a parade of
25 potential horrors about each drug is minimally probative,

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1 maximally prejudicial and should be excluded.

2 THE COURT: Ms. Mortazavi or Mr. Adams.

3 MR. ADAMS: Yes, your Honor.

4 First, I think we already went over this in motions *in*
5 *limine*, and the Court ruled on it.

6 THE COURT: Yes.

7 MR. ADAMS: But to reiterate, Dr. Cole, as opposed to
8 Dr. Bowman, is going to be testifying about, is essentially a
9 dictionary sort of witness: This is the drug that's
10 represented to be in a particular product. This is what this
11 drug is. I know that on the basis of my studies, my expertise.
12 This drug has the following effect on the body of a horse.

13 THE COURT: But why is that relevant?

14 MR. ADAMS: The definition of a drug includes the
15 notion that the substance has an effect on the body of an
16 animal or a human.

17 THE COURT: It does. That's true.

18 MR. ADAMS: That's that.

19 With respect to, beyond that simple fact, the notion
20 of the intent behind this conspiracy is further developed by
21 the nature of that effect, what happens to the body of the
22 horse.

23 THE COURT: All right. But now you're getting back to
24 the question that, I think, Mr. Sercarz raised earlier, which
25 is that the intent element of this charged offense is not an

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1 intent to injure racehorses.

2 MR. ADAMS: No.

3 THE COURT: It's an intent to deceive or mislead.

4 MR. ADAMS: Correct, your Honor. Relevant to that is
5 the fact that these drugs are intended to be performance
6 enhancing, and that is the underlying nature of the overall
7 fraud, that we are attempting to --

8 THE COURT: You didn't plead fraud. You didn't plead
9 a fraud case here. You pled drug adulteration and misbranding
10 with an intent to defraud or mislead.

11 MR. ADAMS: Correct. That's right. That intent to
12 defraud or mislead ties back to the notion that we're going to
13 cheat at horse racing, get away with it, in part through the
14 use of untestable performance-enhancing drugs. The fact that
15 they are, in fact, performance-enhancing drugs speaks to the
16 fact that they did hold exactly the intent that underlies the
17 purpose of the entire (inaudible).

18 Dr. Cole will talk about the effect of the drugs; that
19 will include her talking about the fact that in the body of a
20 horse, for example, a blood-doping drug, just by way of
21 example, will increase the oxygen level and the effect would be
22 greater performance, longer performance, etc.

23 THE COURT: Could be.

24 MR. ADAMS: That's right, and that's subject to
25 cross-examination, obviously. And it's also subject to sort of

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1 the potency and other factors that she will speak to with
2 respect to --

3 THE COURT: And the size of the horse and all kinds
4 of --

5 MR. ADAMS: Precisely, the dosage of the drug, etc.,
6 to the extent, by the way, that any of that was actually on the
7 label, because she's, of course, going off of information that
8 exists in the case at bar.

9 THE COURT: All right. Look, I understand both sides'
10 arguments here. Some of this is really not the type of thing
11 that I can just rule on in a vacuum. You have my rulings from
12 last week.

13 MR. ADAMS: Yes.

14 THE COURT: I gave you leave and I've reconsidered
15 with respect to Dr. Fenger, but my ruling is unchanged, just as
16 my ruling is unchanged with respect to the death of the horse
17 in Delaware. The rest of it I'm going to have to take question
18 by question and rule on objections during the course of how the
19 evidence is unfolding.

20 MR. ADAMS: Thank you, your Honor.

21 MR. FERNICH: I'm just trying to narrow the areas of
22 the dispute for the Court and forecast where I'm going with
23 this.

24 THE COURT: Why don't you try to narrow the areas of
25 dispute with your adversary.

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1 MR. FERNICH: Well, I understand Mr. Adams's point,
2 and I take it. My point does not go to the
3 performance-enhancing effect of the drugs. That's pleaded in
4 the indictment as a relevant motive for the commission of the
5 offenses. I get that.

6 What I'm specifically drilling down into and what
7 Mr. Sercarz's letter, I believe, attempted to get at is the
8 next step, the adverse physical consequences from the horse and
9 potentially adverse physical consequences to the horse, and
10 that's what I'm claiming is maximally prejudicial, minimally
11 probative, given that the definition of unsafe is a purely
12 objective one.

13 THE COURT: But the definition of a drug is something
14 that has an impact on the body of a human or an animal. We
15 talked about this in the context of something earlier in this
16 case. I don't remember when or how it came up, but that's the
17 definition of a drug. So as I understand it, you're intending
18 on the fact of Dr. Fishman, you asked me to include questions,
19 I overruled the government's objection and I'm going to include
20 questions about whether things are homeopathic or just
21 supplements.

22 They're, therefore, entitled to put on evidence that
23 this is a drug within the meaning of the statute, and a drug is
24 something that has an effect on the physical -- I mean, I'll
25 look at the exact language, but that's what the statute says.

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1 You can't have it both ways.

2 MR. FERNICH: I'm not seeking to have it both ways.

3 THE COURT: Well, you kind of are.

4 MR. FERNICH: No. I will confer with Mr. Sercarz and
5 Dr. Fishman to confirm my understanding of the defense in this
6 case.

7 THE COURT: OK.

8 MR. FERNICH: But I do not believe that we're going to
9 contest that these substances are drugs, and that, therefore,
10 should factor into the Court's 403 balancing with respect to
11 the further step that the government wants to take.

12 THE COURT: Right, but Mr. Fernich, I'm going to say
13 what I said before. I can't do a 403 balancing when you
14 haven't even figured out what your position is.

15 MR. FERNICH: We will enlighten the Court as to that
16 first thing tomorrow morning.

17 THE COURT: Right. But I've told you I am not going
18 to rule on it in advance.

19 MR. FERNICH: I understand.

20 THE COURT: OK. So we're not going to waste time. If
21 we have time while we're waiting for the venire to be ready,
22 that's one thing.

23 MR. FERNICH: I certainly don't intend to waste the
24 Court's time.

25 Now, turning to the camel issue, it's my position and

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1 the defense's position as follows: That the camel evidence may
2 have potential relevance as a piece of 404(b) evidence to the
3 extent it is offered for a proper 404(b) purpose and can
4 withstand Rule 403 balancing, but this is plainly extrinsic
5 rather than intrinsic evidence. Nowhere in this 46-page
6 speaking indictment is there any reference to camel drugging.
7 The indictment is singularly focused on the drugging of
8 racehorses, and to be clear, this is not an argument simply
9 about unfair surprise. I'm not claiming that. This is a
10 recipe for a constructive amendment of the indictment, and I
11 would cite *U.S. v. Wozniak*, which I believe is 126 F.3d
12 something or other, a 1997 --

13 THE COURT: Why wasn't this in your *in limine* motions?

14 MR. FERNICH: We didn't understand that the government
15 was going to try to use camel evidence as substantive --
16 substantive, your Honor -- evidence as opposed to potential
17 404(b) -- I can see it coming in as 404(b) evidence with an
18 appropriate limiting instruction. What I can't see is how this
19 could possibly constitute intrinsic evidence of the charged
20 conspiracy.

21 THE COURT: All right. I hear you.

22 OK. Mr. Adams or Ms. Mortazavi, do one of you want to
23 be heard? But I will tell you that this is striking me, again,
24 as -- I don't really know how I'm supposed to rule on this in a
25 vacuum because you're admitting that it may be appropriate in

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1 certain circumstances but in other circumstances it may not,
2 and I have no idea what the government's case is going to look
3 like here.

4 MR. FERNICH: I'm saying it's inappropriate in all
5 circumstances as direct substantive evidence of the charged
6 conspiracies.

7 THE COURT: Right.

8 MR. FERNICH: It may well be appropriate evidence as
9 404(b) proof, to the extent they're saying it's relevant to
10 motive, intent, opportunity.

11 THE COURT: Right.

12 MR. FERNICH: -- absence of mistake and the Court
13 makes a 403 finding. What I'm objecting to is the government's
14 apparent effort to use this as direct substantive proof of the
15 charged conspiracies. It plainly is not. It's not embraced
16 within the scope of the four corners of the indictment. It
17 broadens potential bases for --

18 THE COURT: You're repeating yourself now,
19 Mr. Fernich. I agree with you that it may be inappropriate,
20 but the problem with what you're arguing -- well, there's two
21 problems.

22 One is what I just said -- that I need to see how and
23 if the government even intends to use this. And secondly, when
24 a party introduces evidence, they don't say, Well, I'm
25 introducing this not as direct evidence of the conspiracy but,

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1 instead, for this other purpose. You just introduce evidence.
2 You don't say --

3 So let me hear from someone from the government, and I
4 suspect this is one of these items that I'm going to have to
5 deal with as we have a better sense of how the case is
6 unfolding.

7 MR. ADAMS: Your Honor, I'll speak to it.

8 THE COURT: Pull the mike over, Mr. Adams.

9 Thank you.

10 MR. ADAMS: Thank you, your Honor.

11 I'll speak to it, and I agree that it may well be
12 something that the Court needs to rule on as we get to
13 particular pieces of evidence.

14 THE COURT: OK.

15 MR. ADAMS: What I'd say, though, for the Court's
16 context, as we do that, is that this is direct proof in at
17 least two different ways. One is they're the same drugs that
18 we're talking about, so when Dr. Fishman and Equestology make
19 an HP liter of plus and sell, it is created by Equestology.
20 Equestology is designed to create performance-enhancing drugs
21 for horses. The fact that they are creating the same
22 performance-enhancing drug and then happen to sell it to a
23 client who wants to use it for a camel -- and potentially
24 camels and horses in many cases -- doesn't change the fact that
25 it is direct proof that what Equestology does is make horse

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1 drugs; it's just that the client happens to wants to use it for
2 different purposes.

3 The other point here is that to the extent that the
4 defendants want to argue, at the end of the day, that the jury
5 ought to be instructed simply on the misdemeanor as opposed to
6 the fraudulent felony --

7 THE COURT: Yes. I haven't crossed that bridge.

8 MR. ADAMS: Right. To the extent that that becomes
9 relevant, the difference that they're trying to draw is
10 basically one of the particular direction of fraudulent intent
11 and not as to the fact that they're making this brand of drug.

12 THE COURT: All right. Look, is this something that
13 you're intending to discuss during opening statements?

14 MR. ADAMS: No.

15 THE COURT: OK. So I am ordering there should be no
16 mention of camel evidence, the language you're putting on it --
17 I don't even know what that means fully -- during opening
18 statement from either side. If this issue comes up in the
19 context of what you're intending to do, then you'll let me know
20 about that and we'll deal with it at one of these morning
21 conferences before any mention is made in front of the jury,
22 and I'll rule on it.

23 MR. ADAMS: No problem.

24 THE COURT: Mr. Fernich, if you --

25 I'm going to direct the government the day before to

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1 let Mr. Fernich know so they can have notice.

2 Mr. Fernich, then if you want to submit something in
3 writing to amplify your argument a little bit more so that I
4 can rule on it the following morning and we don't delay things,
5 I will entertain that.

6 MR. FERNICH: Sure, Judge.

7 THE COURT: All right.

8 MR. FERNICH: Thank you.

9 THE COURT: All right. Thank you.

10 OK. Anything else?

11 MR. ADAMS: Your Honor, if there's nothing else of
12 substance, just one thing on procedure --

13 THE COURT: Yes.

14 MR. ADAMS: -- for the remote witness that I wanted to
15 flag --

16 THE COURT: Yes.

17 MR. ADAMS: -- and put on the record.

18 This is with respect to Ms. Adams, who will be one of
19 the first witnesses.

20 THE COURT: He's the witness.

21 MR. ADAMS: She's the witness.

22 She may be -- if we begin witness testimony on
23 Thursday, she will be the first witness, and we are working
24 with Ms. Dempsey and with court technology officers to set up a
25 remote setup for her.

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1 THE COURT: OK.

2 MR. ADAMS: We did a run through this morning that was
3 successful. The notion will be that she will dial in to a
4 Microsoft Teams --

5 THE COURT: Right.

6 MR. ADAMS: -- be visible to the jury. We will be
7 able to share screens to show particular documents to her.

8 THE COURT: You all have screens, right, at your
9 tables? So it will come on those screens.

10 MR. ADAMS: It will come on those screens. It will
11 come on the screen to the Court and will appear to be visible
12 to the jury box as well.

13 THE COURT: Each juror has their own screen.

14 MR. ADAMS: Yes.

15 And then for the gallery there's also a large screen.

16 THE COURT: Yes.

17 MR. ADAMS: All that seemed to be working this
18 morning.

19 What we have done to try and streamline this -- and I
20 flag it for the Court as a sort of point of procedure, and
21 we've spoken with defense counsel about this -- we are sending,
22 we have sent Ms. Adams a copy of the government exhibits that
23 we intend to use with her so that she can, in advance, go
24 through those in bulk. And what I'm going to propose, to avoid
25 what is a rather bulky version of turning off the screen,

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1 having her look at it outside the jury's view, turning it back
2 on, dragging it over, to have her review it, I'll lay
3 foundation for the documents sort of as a group of documents,
4 and then move to admit them subject to connection for relevance
5 down the line. And that way, rather than have to do, showing
6 the witness the document outside the presence of the jury and
7 then change the technology so that we can then display it for
8 the jury, it will be a little more seamless.

9 THE COURT: Have you talked with defense counsel about
10 this?

11 MR. ADAMS: I have, and I understand there is no
12 objection to the procedure.

13 THE COURT: Is that correct, Mr. Sercarz?

14 MR. SERCARZ: Yes. There's no objection to the
15 procedure. We are reserving our right to object if we feel
16 that the use --

17 THE COURT: Sure.

18 MR. SERCARZ: -- of any particular document during the
19 testimony is not relevant or is objectionable for other
20 reasons.

21 THE COURT: Yes, of course.

22 MR. SERCARZ: All right.

23 THE COURT: Mr. Fasulo.

24 MR. FASULO: As to Ms. Giannelli, no objection to the
25 foundation being laid by the government in this way.

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1 THE COURT: OK.

2 MR. ADAMS: Thank you, your Honor.

3 THE COURT: And have you provided those exhibits to
4 the other side?

5 MR. ADAMS: They have been provided. We're going to
6 flag exactly which ones we're going to use.

7 THE COURT: OK. And how are you proposing to get any
8 exhibits the defense might wish to use to -- Ms. Adams, you
9 said is her name?

10 MR. ADAMS: That's correct, your Honor. That is her
11 name.

12 If the defense wishes to use any particular exhibit,
13 obviously the government exhibits are going to be loaded on to
14 the government's computer at the outset of the day, so if
15 there's a particular government exhibit that is already
16 stamped, they just need to tell us which one to throw up, and
17 we can do that. If there's a defense exhibit that they want to
18 put in, we need an electronic version of it in advance to put
19 on to the system to put up for her. But we will be able to --
20 it will be a little more cumbersome, but we will be able to
21 turn off the exhibit for the jury so that Ms. Adams can see it,
22 review it, authenticate it, if need be, and then we'd display
23 it for the jury.

24 THE COURT: Anything from you, Mr. Sercarz, or
25 Mr. Fasulo?

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1 MR. FASULO: One other thing, Judge.

2 THE COURT: On this point.

3 MR. FASULO: On this point.

4 THE COURT: Yes.

5 MR. FASULO: Yes.

6 THE COURT: OK.

7 MR. FASULO: In terms of the 3500 material, we had
8 agreed with the government as well that the 3500 material
9 relevant to Courtney Adams's testimony will be sent to her
10 attorney in Florida ahead of time, so if there's an issue on
11 refreshing recollection or some other nonintroduction evidence
12 issue that's related to the testimony, the witness will have it
13 available if, in fact, the technology in the courtroom failed.
14 So we have agreed that her lawyer can get that and the
15 government will give instructions on how they wish her or not
16 wish her to look at that before she testifies.

17 THE COURT: All right. That makes sense.

18 MR. FASULO: -- agreed to that as well.

19 THE COURT: That is acceptable to you, Mr. Sercarz?

20 MR. SERCARZ: Yes.

21 THE COURT: Mr. Adams, yes?

22 MR. ADAMS: Absolutely, and it will be in the FedEx at
23 4:00.

24 THE COURT: You'd better get moving.

25 Anything else from anyone?

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1 All right. I would like the parties to talk to each
2 other and agree on -- obviously, I need to tell the jurors that
3 this witness is going to be testifying remotely, but all other
4 witnesses we're anticipating are going to be live, and why and
5 that you've worked out all the logistics, so I'd like you to
6 confer with each other.

7 MR. ADAMS: Sure.

8 THE COURT: And give me some proposed language before
9 she takes the stand. OK?

10 MR. ADAMS: OK.

11 MR. FASULO: Judge, on that note, I think the
12 application by the government and our understanding of the
13 reasons are already in the record. I don't think that they're
14 going to all be necessary to tell the jury.

15 THE COURT: No.

16 MR. FASULO: But I do want there to be in the record
17 as to why the defense decided that this was going to be
18 acceptable to the defense.

19 THE COURT: Well, I mean, in fairness, they need to
20 know some basic information --

21 MR. FASULO: Right.

22 THE COURT: -- so that no adverse inferences are going
23 to be drawn from the fact that, by agreement of all parties --

24 MR. FASULO: Right.

25 THE COURT: -- this witness is being permitted to

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1 testify remotely for health-related reasons. Right?

2 MR. ADAMS: Correct.

3 MR. FASULO: Correct.

4 THE COURT: That may be sufficient, but I want you all
5 to talk and give me the agreed language.

6 MR. ADAMS: We will, your Honor.

7 THE COURT: OK?

8 OK. If there's nothing else, then, I thank our court
9 reporter very much. We stand adjourned. I'll see everyone
10 tomorrow morning at 9:30, and hopefully, we'll hear from the
11 jury administration people promptly that they're ready for us.

12 We should all meet here in the morning. When the jury
13 administrator people call us, then we'll go down together. We
14 are all going to collect behind the jury assembly room.

15 Does everyone know what I'm talking about?

16 MS. MORTAZAVI: Yes, your Honor.

17 MR. FASULO: Yes, your Honor.

18 THE COURT: Then when we're ready we'll process in
19 together. Obviously, the government takes the first table over
20 here and then the middle table for Dr. Fishman's counsel, or
21 however you work that out. There are two seats at the table.
22 And then Ms. Giannelli will be at the far right-hand table.

23 OK?

24 MR. SERCARZ: Yes, your Honor.

25 THE COURT: OK. Thanks, everybody. Have a good rest

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1 of the day then. I'll see everybody in the morning.

2 Thank you.

3 MR. FASULO: Thank you, your Honor.

4 (Adjourned)